STATE OF MICHIGAN

COURT OF APPEALS

CHRISTONNA CAMPBELL, Plaintiff-Appellee,	FOR PUBLICATION November 24, 2009
v	No. 281592 Washtenaw Circuit Court
DEPARTMENT OF HUMAN SERVICES, Defendant-Appellant.	LC No. 06-000183-CD Advance Sheets Version

Before: METER, P.J., and MURRAY and BECKERING, JJ.

MURRAY, J. (*concurring in part and dissenting in part*).

I concur in the majority opinion's holding that nothing within *Garg v Macomb Co Community Mental Health Services*, 472 Mich 263; 696 NW2d 646 (2005), amended 473 Mich 1205 (2005), or the three-year statute of limitations, MCL 600.5805(10), precludes plaintiff from bringing forward background evidence of allegedly discriminatory conduct directed towards her that occurred more than three years prior to the filing of the complaint, so long as it is otherwise admissible under the Michigan Rules of Evidence. The United States Supreme Court has held such "time-barred" evidence to be admissible as background evidence to a timely discrimination claim, *Nat'l R Passenger Corp v Morgan*, 536 US 101, 113; 122 S Ct 2061; 153 L Ed 2d 106 (2002) ("Nor does the statute [Title VII] bar an employee from using the prior acts as background evidence in support of a timely claim."), and even though the Michigan Supreme Court has not issued a final opinion precluding such background evidence, it almost did, *Garg*, *supra* at 263 n 14, but then seemed to change its mind, see *Garg* as amended, *supra* at 1205, striking the original footnote 14 and renumbering the remaining footnotes, and see *Ramanathan v Wayne State Univ Bd of Governors*, 480 Mich 1090, 1097 (MARKMAN, J., dissenting).

However, the majority errs in its conclusion that the trial court properly denied defendant's motion for a directed verdict. The testimony produced by plaintiff during her case-in-chief, which included only that of plaintiff and Michael Johnson, the male employee who received the only actionable promotion at issue, was insufficient as a matter of law to prove that plaintiff was subject to unlawful sex discrimination in her failure to be promoted to the Arbor Heights center director position in 2002. Accordingly, I dissent from that portion of the majority's opinion.

The elements required to prove a case of sex discrimination under a "disparate treatment" theory are well settled.[1] In order to prove her sex discrimination case, plaintiff was required to show that she was a member of a class protected by the Civil Rights Act, MCL 37.2101, and that she was treated differently than a member of a different class for the same or similar conduct. *Lytle v Malady* (*On Rehearing*), 458 Mich 153, 181; 579 NW2d 906 (1998) (opinion by WEAVER, J.); *Merillat v Michigan State Univ*, 207 Mich App 240, 247; 523 NW2d 802 (1994). Because there is no dispute that plaintiff was a member of a protected class, to create an inference of disparate treatment plaintiff had to prove that she was similarly situated to Johnson, which required proving that "'all of the relevant aspects' of [her] employment situation were 'nearly identical' to those of [Johnson's] employment situation." *Town v Michigan Bell Tel Co*, 455 Mich 688, 699-700; 568 NW2d 64 (1997) (opinion by BRICKLEY, J.), quoting *Pierce v Commonwealth Life Ins Co*, 40 F3d 796, 802 (CA 6, 1994); see, also, *Wilcoxon v Minnesota Mining & Mfg Co*, 235 Mich App 347, 370; 597 NW2d 250 (1999). If plaintiff proves that she was similarly situated to Johnson, a rebuttable presumption of discrimination arises. However, the presumption is not conclusive of unlawful discrimination and, in fact, *dissipates* once defendant articulates a legitimate non-discriminatory reason for not promoting plaintiff. See *Hazle v Ford Motor Co*, 464 Mich 456, 462-465; 628 NW2d 515 (2001); *Lytle*, *supra* at 172-174 (opinion by WEAVER, J.). Once the presumption has been rebutted, plaintiff must come forward with evidence to show not only that defendant's reasons for not promoting plaintiff were false, but also that the motivating factor in the decision was plaintiff's sex. *Hazle*, *supra* at 474-475. The court can neither second-guess defendant's decision nor focus on whether that decision was "'wise, shrewd, prudent, or competent.'" *Id*. at 464 n 7, quoting *Town*, *supra* at 704. The only question is whether unlawful "'discriminatory animus'" motivated defendant's decision. *Hazle*, *supra* at 464 n 7, quoting *Texas Dep't of Community Affairs v Burdine*, 450 US 248, 257; 101 S Ct 1089; 67 L Ed 2d 207 (1981).

In this case, plaintiff's entire case-in-chief revolved around evidence that she was a qualified and prosperous employee who was more qualified than Johnson for this promotion. Plaintiff's case was based upon two related theories. First, plaintiff testified about how well she served in different capacities during her employment with the state,[2] and how Johnson had allegedly received some discipline during his service with the state. Second, plaintiff testified in very general terms about different positions—some of which she applied for and some of which she didn't—that she felt qualified for over the years but that went to a male employee. Neither of these proofs was sufficient to submit this case to a jury.

Taking the theories in reverse order, what was substantially missing from plaintiff's background proofs was any suggestion that she was similarly situated to anyone that received any prior position. In fact, there was no evidence at all about the qualifications of any male (excluding Johnson) who received positions that plaintiff thought she should have received (even

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[1] Plaintiff must utilize this burden-shifting criteria because she did not produce any direct evidence of discrimination.

[2] During plaintiff's case-in-chief, defendant offered to stipulate that plaintiff was a good employee throughout her employment with the state, so this issue was never in dispute.

if she didn't apply for them), and thus the jury had no evidence to make any comparison with respect to the relative qualifications of those males and whether they were similarly situated to plaintiff. Thus, the conclusory evidence of prior positions held by males that plaintiff thought she should have received did not constitute evidence of sex discrimination, or a predisposition by defendant to discriminate against plaintiff because of her gender when she did not receive the Arbor Heights promotion.

There certainly was enough evidence to show that plaintiff was similarly situated to Johnson. However, there was no evidence of pretext in defendant's choice of Johnson over plaintiff. For one, plaintiff's belief that she was more qualified than Johnson does not constitute evidence of unlawful sex discrimination, for "'a plaintiff's own opinions about her work performance or qualifications do not sufficiently cast doubt on the legitimacy of her employer's proffered reasons for its employment actions.'" *Millbrook v IBP, Inc*, 280 F3d 1169, 1181 (CA 7, 2002), quoting *Ost v West Suburban Travelers Limousine, Inc*, 88 F3d 435 (CA 7, 1996). And, although in some limited cases evidence that a plaintiff was better qualified can be proof of pretext, *Ash v Tyson Foods, Inc*, 546 US 454, 457; 126 S Ct 1195; 163 L Ed 2d 1053 (2006), courts have been instructed not to sit as "'super personnel department[s]'" by second-guessing otherwise legitimate decisions. *Millbrook, supra* at 1181, quoting *Simms v Oklahoma ex rel Dep't of Mental Health*, 165 F3d 1321, 1330 (CA 10, 1999). See, also, *Burdine, supra* at 259. To keep from acting in this manner, courts have uniformly held that to be considered evidence of pretext the evidence must show that the qualification "'differences are so favorable to the plaintiff that there can be no dispute among reasonable persons of impartial judgment that the plaintiff was clearly better qualified for the position at issue.'" *Millbrook, supra* at 1179, quoting *Deines v Texas Dep't of Protective and Regulatory Services*, 164 F3d 277, 279 (CA 5, 1999). Accord *Ash, supra* at 457-458, and cases cited therein.

As noted, the evidence offered by plaintiff did not show that her qualifications were such that she was clearly the better-qualified candidate, and therefore she did not present sufficient evidence of pretext. Both she and Johnson had a comparable level of education and years of experience in the relevant fields. Both had held positions above their normal pay grade. And, although plaintiff had the recommendation of the individual who was being replaced as center director, that alone does not make plaintiff the clearly better-qualified candidate. Or, stated differently, it does not create any inference of discriminatory treatment by defendant in this employment decision. All that plaintiff's evidence allowed the jury to do was determine whether defendant promoted the better-qualified candidate, and that is not what the Civil Rights Act was meant to do. *Ash, supra*; *Burdine, supra*; *Millbrook, supra*.[3] As the Supreme Court held in *Burdine*:

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[3] Indeed, in denying defendant's motion for a directed verdict, the trial court ruled that plaintiff's testimony that she felt she was promised the center director position because she was more qualified than Johnson, and that Johnson thought plaintiff would get the position, created an issue of fact for the jury. But all this evidence did was create an issue with respect to whether defendant made the best decision, rather than whether it made a discriminatory one.

> The views of the Court of Appeals can be read, we think, as requiring the employer to hire the minority or female applicant whenever that person's objective qualifications were equal to those of a white male applicant. But Title VII does not obligate an employer to accord this preference. Rather, the employer has discretion to choose among equally qualified candidates, provided the decision is not based upon unlawful criteria. The fact that a court may think that the employer misjudged the qualifications of the applicants does not in itself expose him to Title VII liability, although this may be probative of whether the employer's reasons are pretexts for discrimination. *Loeb v. Textron, Inc*., [600 F2d 1003, 1012 n 6 (CA 1, 1979)]; see *Lieberman v. Gant*, 630 F.2d 60, 65 (CA 2 1980). [*Burdine, supra* at 259.]

I would reverse the judgment and remand for entry of an order granting defendant's motion for a directed verdict.

/s/ Christopher M. Murray